

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERNIE R. KETTLEWELL,

Case No. 09-13919

Plaintiff,

George Caram Steeh

vs.

United States District Judge

COMMISSIONER OF
SOCIAL SECURITY,

Michael Hluchaniuk

United States Magistrate Judge

Defendant.

REPORT AND RECOMMENDATION
DISMISSAL FOR FAILURE TIMELY EFFECTUATE SERVICE

I. PROCEDURAL HISTORY

This matter is before the Court on a complaint for judicial review following an adverse decision of the Commissioner of Social Security. (Dkt. 1). The complaint was filed on October 5, 2009, and referred to the undersigned for all pretrial purposes. (Dkt. 2). An earlier review of the record in this matter indicated that there has been no return of service of the summons and complaint on defendant. On January 14, 2010, the Court issued an order to show cause why a report and recommendation to dismiss this matter for failure to effect timely service of process should not be issued. (Dkt. 4). Plaintiff was given until January 28, 2010 to respond to the order to show cause and cautioned that failure to comply with the order to show cause would result in a report and recommendation for

dismissal based failure to effect service within the time specified. (Dkt. 4). On January 27, 2010, plaintiff responded, indicating his belief that Court staff would effectuate service and then electronically requested the summons to be issued. (Dkt. 5). A summons was issued on January 29, 2010. (Dkt. 6). Nearly eight months have passed and defendant has not been served.

II. ANALYSIS AND CONCLUSION

Federal Rule of Civil Procedure 4(m) provides that if service is not effectuated within 120 days the Court must dismiss the action without prejudice as to that defendant. “Absent a showing of good cause to justify a failure to effect timely service, the Federal Rules of Civil Procedure compel dismissal.” *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996), citing, *Habib v. General Motors Corp.*, 15 F.3d 72, 73 (6th Cir. 1994). It is plaintiff’s burden to establish good cause for failing to timely effect service. *Habib*, 15 F.3d at 73. Further, Local Rule 41.2 provides that if the parties have not taken action within a reasonable time, the Court may enter an order dismissing the case for lack of prosecution.

Plaintiff failed to serve the summons and complaint after being warned that failure to do so could result in dismissal. Therefore, the undersigned recommends that plaintiff’s complaint be dismissed without prejudice pursuant to Rule 4(m) and Local Rule 41.2. *See Habib*, 15 F.3d at 73 (“Absent a showing of good cause to

justify a failure to effect timely service, the Federal Rules of Civil Procedure compel dismissal.”).

III. RECOMMENDATION

Based on the foregoing, the undersigned **RECOMMENDS** that plaintiff's complaint be **DISMISSED** without prejudice pursuant to Rule 4(m) and Local Rule 41.2.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec’y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec’y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed’n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as “Objection No. 1,” “Objection No. 2,” etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an

objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed.R.Civ.P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as “Response to Objection No. 1,” “Response to Objection No. 2,” etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: September 8, 2010

s/Michael Hluchaniuk
Michael Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on September 8, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to the following: Carl A. Anderson, Herman J. Anderson, and the Commissioner of Social Security.

s/Darlene Chubb
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